



Maina v Honeycare Limited (Employment and Labour Relations Appeal E144 of 2022) [2024] KEELRC 855 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 855 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E144 OF 2022**

AN MWAURE, J

APRIL 12, 2024

BETWEEN

JOHN MAINA APPELLANT

AND

HONEYCARE LIMITED RESPONDENT

(Being an Appeal from the entire judgment of the Chief Magistrates Court at Milimani, Nairobi by Hon. Lucy Njora delivered on the 22nd July 2022, in CMEL No. E523 of 2020)

JUDGMENT

1. The Appellant being dissatisfied by the entire judgment and decree of the Chief Magistrates Court of Kenya at Nairobi by Hon. Lucy Njora, SPM, delivered on 22nd July 2022, filed this appeal vide a Memorandum of Appeal dated 19th August on grounds that: -
 1. the learned trial magistrate erred in law and fact by finding that the Claimant's dismissal was justified and lawful;
 2. the trial magistrate erred in law and fact by holding that the Respondent did not appear nor tender any oral defence of the claim, but conversely determining that the Claim was Defended successfully;
 3. the trial magistrate erred in law and fact arguing, and even submitting on behalf of the Respondent in its absence from the proceedings;
 4. the trial magistrate erred in law and fact by holding that the Claimant was issued with a non-existent Settlement Agreement purportedly dated 31st March 2020, which the trial court erroneously held was voluntarily signed by the Claimant;



5. the trial magistrate erred in law when she held that an employer can exercise a right to terminate services of an employee outside the procedure provided for under the [Employment Act](#), 2007;
 6. the trial magistrate erred in law by finding that an employment contract is like any other contract; and
 7. the trial magistrate erred in law and fact by failing to interrogate Section 42 of the [Employment Act](#).
2. The Appellant prayed for orders that: -
1. this Appeal be allowed;
 2. the judgment and decree delivered by learned Hon. Lucy Njora (SPM) on 22nd July 2022 be set aside and the Memorandum of Claim dated 28th July 2020 be allowed;
 3. costs be provided for.

Appellant's Submissions

3. The Appellant avers that in his witness statement, it was stated that on 31.03.2020, the Human Resource Manager called and ambushed him to sign a letter titled "Employment Termination" dated 30.03.2020. He was not given an opportunity to read through the Letter or any reason why his services were being terminated. The trial court was within its powers to evaluate the procedure and or reasons for which the Respondent terminated the Appellant and hold the Respondent accountable for unlawfully terminating the Appellant's services without giving the Appellant any justifiable reason.
4. That Appellant submitted that the trial magistrate erred in law and fact in determining that his termination was lawful and justified as he proved in the trial court that his termination was wrongful, however, the Respondent failed to justify the reasons as why it terminated his services
5. The Appellant submitted that although the Respondent filed a Statement of Response together with a witness statement, it failed to call any witness to testify or tender any oral defense. Where a party fails to adduce evidence, his pleadings remain mere allegations which are not proved, therefore, the trial magistrate erred in law and fact by determining that the Respondent defended the claim successfully.
6. The Appellant submitted that Section 112 of the [Evidence Act](#) provides that the burden of proving or disapproving facts in proceedings is upon the parties to those proceedings. Therefore, the court's duty is to evaluate the legal right to decide and not argue or submit on behalf of the parties. The trial magistrate erred in law and fact arguing and even submitting on behalf of the Respondent in its absence from the proceedings.
7. The Appellant submitted he did not plead to having voluntarily signed a Settlement Agreement issued by the Respondent and he did not raise the issue at any time during the trial and as such the trial court had no power to make a determination that the Appellant was issued and voluntarily signed a non – existent Settlement Agreement dated 31.03.2020 which agreement was outside the pleadings.
8. It is the Appellant's submission that he discharged the burden of establishing there was an employer-employee relationship between the parties in the trial court proceedings. Therefore, the Respondent disregarded to apply the standard of a fair procedure under statutory law as it had no right to invoke its contractual obligations to terminate the Appellant's services as the Employment contract is protected by statutory law.



9. The Appellant submitted that he was placed on probation for a period of 6 months and he was confirmed as permanent employee subject to a satisfactory review of his performance vide a Letter of Confirmation dated 28.02.2020. The Appellant being a permanent employee, the trial court erred in law and fact by failing to interrogate the provisions of Section 42 of the *Employment Act* in making its determination.

Respondent's Submissions

10. The appeal was undefended as the Respondent failed to file its response.

Analysis and determination

11. Arising from the grounds of appeal, the following are the issues for determination:
- a. Whether the learned trial magistrate erred in law and fact by finding that the Claimant's dismissal was justified and lawful.
 - b. Whether the learned trial magistrate erred in law and fact by holding that the Claimant was issued with a non-existent Settlement Agreement purportedly dated 31st March 2020, which the trial court erroneously held was voluntarily signed by the Claimant
12. Whether the learned trial magistrate erred in law and fact by finding that the Claimant's dismissal was justified and lawful.
- It is not in dispute that the Appellant was employed by the Respondent as a Financial Controller as vide a letter of offer dated 07.08.2019, however, vide a letter dated 16.01.2020, the terms of the contract was reviewed by change of his position from a Financial Controller to a Credit Controller. The Appellant dully acknowledged receipt, which confirms his consent of the variation.
13. Upon completion of the probation period, the Appellant's employment was confirmed vide a letter dated 28.02.2020. however, this was short-lived as he was served with a termination letter dated 31.03.2020, which he alleges he was coerced to sign without being given an opportunity to read through the Letter or any reason why his services were being terminated.
14. Accordingly, the Appellant duly proved in the trial court that he was indeed a permanent employee of the Respondent by virtue of confirmation of his employment as a Credit Controller on 28.02.2020.
15. In its witness statement filed in the trial court, the Respondent averred that an employer has an option to terminate an employee's employment either under contractual or statutory terms, it elected the former and did not have to assign any reason or justification for termination.
16. However, this court dissents from this argument as the law on termination of employment contracts has been clearly laid down under the *Employment Act* which supersedes terms of any contract that violates its provisions.
17. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the court held:
- “The law on termination of contracts of service in Kenya is now largely governed by the *Employment Act*, 2007. Of significance in this respect are sections 41, 43, 44, 45 and 47 of the Act.



Section 41(1) of the Act provides as follows: -

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

Section 43 provides as follows:

- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

Section 45 of the Act provides in part as follows: -

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove: -
 - (a) That the reason for the termination is valid;
 - (b) That the reason for the termination is a fair reason:
 - Related to the employees conduct, capacity or compatibility; or
 - Based on the operational requirements of the employer; and
 - That the employment was terminated in accordance with fair procedure.”

Section 47(5) of the Act stipulates as follows: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

18. Justice Manani in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [supra] held as follows:

“My understanding of these provisions of law is that they seek to substantially regulate termination of contracts of service particularly by an employer. First, an employer may not terminate an employee except for good cause. Some of the grounds that constitute good cause under section 41 of the Act are: poor performance; physical incapacity; and gross misconduct. Section 40 of the Act provides redundancy as the other substantive ground for termination but which is unrelated to those set out under section 41.



But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service.

Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.”

19. In view of the foregoing, for termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.
20. In the instant suit, the Respondent failed to adhere to both substantive and procedural fairness as it failed to prove that it had any valid reason to terminate the Appellant’s employment as provided under Section 43 of the *Employment Act*. The Respondent further failed to grant the Appellant procedural fairness as provided under Section 41 of the *Employment Act*. The termination of the Appellant’s employment was unlawful and unfair as it was void of both substantive and procedural fairness.
21. In the case of *Kenfreight E.A Limited vs Benson Nguti (2016) eKLR* the court held that it is not enough to terminate employment by notice or payment in lieu thereof termination should be based on valid reason and fair procedure should be followed.
22. Accordingly, the learned trial magistrate was not right in law and fact by finding that the Claimant’s dismissal was justified and lawful.

Another issue is whether the learned trial magistrate erred in law and fact by holding that the Claimant was issued with a non-existent Settlement Agreement purportedly dated 31st March 2020, which the trial court erroneously held was voluntarily signed by the Claimant

23. The trial court in its judgement held that:-

“The Respondent avers that further to the Claimant being issued with a termination notice, he was also issued with a settlement agreement dated 31st March 2020 which he freely and willingly executed without protest. The execution of the settlement agreement by the Claimant constituted a complete contract. It was the Respondent’s legitimate expectation that payment of the amount stated in the settlement agreement would absolve it from any further claims under the said contract and even in relation to the Claimant’s termination.”
24. However, it is the Appellant’s position that the Respondent coerced him to sign the said settlement agreement and clearance form hence the same is not binding.
25. The claimant was just served with a termination notice and was not given any reason whatsoever as to why he was terminated. It is mandatory for an employer to inform the employee the reasons for termination under section 43 and section 45 of the *employment act*.
26. Furthermore after giving an employee the reason for termination the employee must be taken through mandatory disciplinary hearing as provided ins section 41 (1) of the *employment act*. the same provides as follows:



- 41.
- (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
27. Having failed to follow the mandated requirements of the law as provided in the *employment act* the respondent terminated the claimant unfairly and un procedurally.
28. There are numerous case laws that provide that the employer who considers terminating his employee must prove substantial as well as procedural justification in order to pass the fairness test. In the case of Walter Anuro vs Teachers service commission cause 955 of 2011 the court held that “ for termination to pass the fairness test it ought to be shown that there was not only substantive justification but also procedural fairness.”
29. The respondent showed no reason at all why he terminated the claimant and he did not take him through the disciplinary process which is mandatory under section 41 of the *employment act*.
30. The discharge voucher the claimant was said to have signed merely states the amounts paid and is actually titled “ cheques payment voucher”. The court was not provided with evidence that the claimant was informed he was signing a discharge voucher to indemnify the respondent from any liabilities. It as well could have been an acknowledgment note of his payment.
31. It is also not lost to the court that the respondent did not plead about the discharge letter in his response but only referred to the termination letter. He did not give viva voce evidence in court and so the court could only rely on the pleadings. And in the pleadings the discharge voucher was not specifically referred to.
32. In view of the foregoing, the court agrees with the appellant and holds that the trial magistrate erred in law and fact in finding that the appellant was lawfully and fairly dismissed.
33. The court therefore allows the appeal with costs to the appellant.
34. The judgment delivered by Hon Lucy Njora on 22nd July 2022 and decree thereof is to be set aside and memorandum of claim dated 28th July 2022 be allowed and the relief awarded is 4 months compensation for wrongful unlawful termination at kshs 60,000x4= 240,000 and also appellant to be issued with the certificate of service within 30 days.
35. The trial court did not seem to award costs and so each party to bear their costs of the lower court proceedings.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

